



INTERIOR BOARD OF INDIAN APPEALS

Estate of Fannie Newrobe Choate

7 IBIA 171 (07/31/1979)

Judicial review of this case:

Affirmed, *Sherman v. Andrus*, No. CV-79-73-GF (D. Mont. July 20, 1981)

Related Board case:

6 IBIA 144



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF FANNIE NEWROBE CHOATE

IBIA 79-4

Decided July 31, 1979

Appeal from the decision of an Administrative Law Judge after reversal of an order denying petition for rehearing and remand for new hearing where appellants had opportunity to contest the validity of decedent's December 6, 1974, will.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will, and an Indian is not deemed to be incompetent to make a will by virtue of his (her) being unable to manage his (her) own property or business affairs or by appointment of a guardian for him (her).

2. Indian Probate: Wills: Testamentary Capacity

Being aged and uneducated, being unable to read or write, being unable to understand the English language, and possessing impaired hearing and poor eyesight are conditions that do not necessarily disqualify one from making a will.

3. Indian Probate: Wills: Publication

There is no requirement in the Indian probate regulations or the applicable statutes that the testator (testatrix), at the time of the execution of his (her) will, "publish" the same by openly declaring it to be his (her) last will and testament.

4. Indian Probate: Wills: Witnesses: Attesting

Applicable Departmental regulations do not require that the attesting witness know the language of the testatrix; it is required that the witness merely know that she is acting as an attesting witness.

5. Indian Probate: Wills: Failure to Establish: Opportunity

The Department of the Interior has consistently held that mere suspicion or an opportunity to influence testator's (testatrix's) mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon the testamentary act.

6. Indian Probate: Wills: Undue Influence

To invalidate a will on the ground of undue influence contestants must show such influence to have been exerted to the extent of destroying the free will of the testator (testatrix) or that the will of another was substituted for that of the testator (testatrix) and this amounts to more than the opportunity or possibility that undue influence was brought to bear on the testator (testatrix).

7. Indian Probate: Appeals: Administrative Law Judge as Trier of Facts

It has been consistently held that an examiner's (presently Administrative Law Judge) findings based on that part of the evidence which printed words do not preserve are not ordinarily reviewable by the agency, and examiner's findings on veracity must not be overturned without very substantial preponderance in testimony as recorded.

APPEARANCES: D. Patrick McKittrick, Esq., for appellants, Helen Edmo Sherman, Vincent Spotted Bear, Jack Edmo, Roy (Archie, Jr.) St. Goddard and Mary New Robe Redhead; Smith, Emmons, Baillie & Walsh, by James R. Walsh, Esq., for appellee, Jeanette Marceau.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from the Decision, Order and Decree of Distribution of Administrative Law Judge Keith L. Burrowes, issued September 8, 1978, approving the last will and testament of Fannie Newrobe Choate, Blackfeet Allottee No. 87, dated December 6, 1974, wherein decedent devised all of her property, real, personal, and mixed, to Jeanette Rattler Choate Marceau, Blackfeet Allottee No. 2810.

The essential facts are contained in Judge Burrowes' decision of September 8, 1978, in which he found, inter alia, that--

1) There is no requirement in the Indian probate regulations or the applicable statutes that the testatrix, at time of the execution of the will, "publish" the same by openly declaring it to be her last will and testament. (Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971)).

2) The fact that a specific form was used for the preparation of the will and the affidavit, which form contains statements not supported by the testimony, is not controlling, but the testimony as it relates to the requirements is controlling.

3) The attestation of an Indian will is the act of witnessing the performance of the requirement of the execution of the will in writing. By signing the document the witness is signifying that he witnessed the execution of that specific document.

4) The fact that one interpreter is a first cousin of Joe Marceau, the husband of the beneficiary, and the other interpreter's husband is a first cousin of the beneficiary would not disqualify any of them from such duties.

5) It is not necessary nor required that agency records concerning the status of Individual Indian Money accounts as to control or lack thereof be checked before the preparation of a will by an Agency Probate Clerk or anyone else.

6) The existence of a guardianship over the person or property of the testatrix does not prevent the making of a valid will by the ward, and the prior adjudication of the mental incompetency of the testatrix to manage her property is only one of the factors to be considered in the determination of testamentary capacity. (Estate of Mae F. Lassley, IA-882, Sept. 29, 1958).

7) The fact that Faye Hoyt could not remember from whom she got the call to come to the hospital to make a will and the fact that she destroyed the notes from which she made the will do not invalidate the will as prepared.

8) The testimony of Faye Hoyt, Marisha Ironpipe Hall, and Mary Madplume, read in its entirety and taken together, establishes a pattern of activity which resulted in the proper preparation, execution, and attestation of decedent's will dated December 6, 1974, referred to as exhibit 1.

9) The issue of who would be the natural object of the bounty of Fannie Choate is adequately answered in the record without any finding of a legally recognized adoption.

10) Exhibits 11 and 12 show recognition by the Department of the Interior of the adoption of Jeanette Rattler by George and Fannie Choate, prior to the effective date (January 8, 1941) of 25 U.S.C. § 372(a). Exhibits 11 and 12, pages of the June 30, 1926, and March 31, 1933, Census of the Blackfeet Indian Reservation, compiled by the Bureau of Indian Affairs, show Jeanette Rattler as the adopted daughter of George and Fannie Choate, as is Edith Biglodgepole Caril, unallotted Blackfeet U-4104.

11) Fannie Choate was mentally capable to make a will on December 6, 1974.

12) Fannie Choate was susceptible to being dominated by another.

13) Jeanette Marceau was capable of and had the opportunity to control the mind and actions of Fannie Chaote on December 6, 1974.

14) There is insufficient evidence that Jeanette Marceau did in fact exert influence upon Fannie Choate which was calculated to induce or coerce her into making a will that was contrary to her own desires.

15) The will of December 6, 1974, made by Fannie Choate, expresses her own desires.

The appellants contend in substance that--

1) The will was not executed, published, or attested to in accordance with the law.

2) The testatrix was incompetent to make a will at the time of its making.

3) The testatrix was under the complete dominance of Jeanette Marceau and Jeanette Marceau unduly influenced the making of the December 6, 1974, will.

The Board has thoroughly reviewed the record including the testimony of witnesses and exhibits included in the hearing

transcript and concludes that the above findings, decision, and order of Judge Burrowes are supported by a preponderance of the evidence.

[1] The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will, and an Indian is not deemed to be incompetent to make a will by virtue of his (her) being unable to manage his (her) own property or business affairs or by appointment of a guardian for him (her). Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

[2] Being aged and uneducated, being unable to read or write, being unable to speak or understand the English language, and possessing impaired hearing and poor eyesight are conditions that do not necessarily disqualify one from making a will. Estate of Taf-poie (Tof-pie), IA-1413 (May 9, 1966).

[3] There is no requirement in the Indian probate regulations or the applicable statutes that the testator (testatrix), at the time of the execution of his (her) will, "publish" the same by openly declaring it to be his (her) last will and testament. Estate of William Cecil Robedeaux, supra.

[4] Applicable Departmental regulations do not require that the attesting witness know the language of the testatrix; it is required that the witness merely know that she is acting as an attesting witness. Estate of Matilda Levi, A-24653 (Nov. 3, 1947).

[5] The Department of the Interior has consistently held that mere suspicion or an opportunity to influence testator's (testatrix's) mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or that there was pressure operating directly upon the testamentary act. Estate of Charles Mjissepe (Pack choa be) or Sapesa Polecat, IA-T-3 (May 12, 1967).

[6] To invalidate a will on the ground of undue influence contestants must show such influence to have been exerted to the extent of destroying the free will of the testator (testatrix) or that the will of another was substituted for that of testator (testatrix), and this amounts to more than the opportunity or possibility that undue influence was brought to bear on the testator (testatrix). Estate of John J. Akers, IA-D-18 (Feb. 26, 1968); 77 I.D. 268 (Sept. 9, 1970) affirmed as Akers v. Morton, 333 F. Supp. 184 (D. Mont. 1971).

We note that in arriving at certain of his findings Judge Burrowes relied greatly upon the testimony of certain witnesses. Judge Burrowes indicates at pp. 9 and 10 of his decision that he had an opportunity to observe each of the witnesses and give consideration to their credibility.

[7] It has been consistently held that an examiner's (presently Administrative Law Judge) findings based on that part of the evidence which printed words do not preserve are not ordinarily reviewable by the agency, and examiner's findings on veracity must not be overturned without very substantial preponderance testimony as recorded. Allentown Broadcasting Corp. v. Federal Communications Commission, 222 F.2d 781 (D.C. Cir. 1954), cert. denied, 348 U.S. 910.

We adopt Judge Burrowes' decision.

Further, we find appellants' contentions, supra, to be without merit.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision, Order and Decree of Distribution of Administrative Law Judge Keith L. Burrowes issued September 8, 1978, is AFFIRMED, and the appeal is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Frank Arness
Administrative Judge

//original signed
Wm. Philip Horton
Chief Administrative Judge